



GOVERNMENT'S TRIAL BRIEF

Nov. 12, 1997

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III. ELEMENTS OF THE CHARGED OFFENSES

A. 18 U.S.C. § 844(d)

Counts 1, 2, 5 and 8 charge violations of 18 U.S.C. § 844 (d). That section provides in pertinent part:

Whoever transports . . . in interstate . . . commerce any explosive with the knowledge or intent that it will be used to kill, injure, or intimidate any individual . . . shall be [guilty of a federal offense].

To obtain a conviction under § 844(d) the government must prove the following elements: (1) transportation in interstate commerce; (2) of an explosive; (3) "with the knowledge or intent that it would be used to kill, injure, or intimidate any individual." United States v. Michaels, 796 F.2d 1112, 1118 (9th Cir. 1986); United States v. Carlson, 561 F.2d 105, 108 (1st Cir. 1977).

1. Transportation in Interstate Commerce

The obvious way for the government to satisfy its burden under this element is to prove that the defendant constructed the bomb in Montana and transported it to California to be placed (Scrutton) or mailed (Gelernter, Epstein, Murray), as the case may be. Indeed, that is what the government intends to prove with respect to each of the charged bombs.

However, this element may also be satisfied by proving that the bombs were mailed. United States v. Michaels, 796 F.2d 1112, 1118 (9th Cir. 1986) ("When a defendant places [a bomb] in an authorized mail depository, to be sent and delivered according to the directions thereon by the Postal Service of the United States, he has placed the [bomb] in interstate commerce.") Accordingly, with respect to the Gelernter, Epstein and Murray bombs, the government will satisfy its burden by showing both that the bombs were transported from Montana to California and that, once in California, they were again placed in interstate commerce when they were mailed.

It is not necessary for the government to prove that the defendant had his bombing targets in mind during his interstate travel. United States V. Carlson, 561 F.2d 105, 108-09 (1st Cir. 1977). This proposition will impact at least two of the charged bombs. Being a placed device, the government believes the evidence will show that the bomb that killed Hugh Scrutton was not intended for a specific individual but was intended to kill anyone in the computer field. The government also believes the evidence will show that the decision to place the bomb behind Rentech was a last minute change of plans. The bomb which killed Gilbert Murray was addressed to another individual and therefore could not be said to have been intended for Murray.

2. An Explosive

Title 18, section 844(j) defines the term "explosive" to include:

"any . . . device that contains any oxidizing and combustible units, or other ingredients, in such proportions, quantities, or packing that ignition by fire, by friction, by concussion, by percussion, or by detonation of the compound, mixture, or device or any part thereof may cause an explosion."

3. Intent to Kill

Evidence of intent to kill can come from a variety of sources. See United States v. Collins, 109 F.3d 1413, 1420-21 (9th Cir. 1997) (Evidence of stalking, that the bomb was constructed to explode upon opening, that it was an "enhanced fragmentation" device containing staples, screws and nails was relevant to proving defendant's intent to kill); See also United States v. Matthews, 36 F.3d 821, 824 (9th Cir. 1994) (Concurring/dissenting opinion of Wiggins, J.) ("As any soldier can tell you, pre-fragmented shrapnel is the hallmark of antipersonnel munitions because the projectiles penetrate soft human tissue and kill by internal injuries . . . "); United States v. Kikumura, __ F.Supp. __, 1997 WL 583246 at *4 (D.N.J., August 28, 1997) ("Because lead shot has no utility in an explosive device used merely to cause damage to property, its existence was found to further demonstrate an intent by Kikumura to create anti-personnel bombs.")

In this case, the government will draw upon the defendant's writings to prove that he formed a desire to kill as early as 1966 and that this desire remained unabated to the day of his arrest. We will also draw upon his experiments to show that the defendant spent a great detail of time

attempting to perfect a consistently lethal bomb and that this experimentation included close examination of the effects of fragmentation and various efforts to improve it. Finally, the government will prove through x-rays, photographs and medical testimony, that the defendant's bombs were, in fact, enhanced fragmentation devices which resulted in death or potentially lethal injury to their victims.

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B. 18 U.S.C. § 1716

Counts 3, 6, and 9 charge violations of 18 U.S.C. § 1716. That section provides in pertinent part:

Whoever knowingly deposits for mailing . . anything declared nonmailable by this section with intent to kill, or injure another shall be [guilty of a federal offense].

Nonmailable matter is defined in the statute as including "all explosives, inflammable materials, infernal machines, and mechanical, chemical or other devices or compositions which may ignite or explode." 18 U.S.C. § 1716(a).

To obtain a conviction under § 1716 the government must prove the following elements: (1) that the defendant knowingly deposited for mailing or knowingly caused to be delivered by mail a device or composition that could ignite or explode; and (2) that the defendant acted with the intent to kill or injure another.

1. Mailing

Proof that the defendant used the mails may be made by direct or circumstantial evidence. United States v. Keplinger, 776 F.2d 678, 690-91 (9th Cir. 1985); United States v. Miller, 676 F.2d 359, 362 (9th Cir. 1982) (Testimony that all documents that are hand delivered were marked "delivered" was sufficient to enable jury to find that letter not marked "delivered" had been mailed). If the government produces evidence that the defendant used the mails, the matter is one for the jury. United States v. Green, 745 F.2d 1205, 1208 (9th Cir. 1985).

In this case, the government will present testimony with respect to the Epstein, Gelernter and Murray bombs, that the packages containing the bombs contained canceled postage, postmarks and other indicia of mailing. In the case of the Murray bomb, the government will present eyewitness testimony that the parcel was delivered by mail.

2. Intent to Kill

The government's evidence with respect to intent to kill under §1716 will be much the same as for intent to kill under §844(d). See supra at pp. 28-29.

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C. 18 U.S.C. § 924(c) (1)

Counts 4, 7, and 10 charge violations of 18 U.S.C. § 924(c) (1). That section provides in pertinent part:

Whoever, during and in relation to any crime of violence . . . for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence . . . be [be guilty of a federal offense]

To obtain a conviction under 18 U.S.C. § 924(c) (1) the government must prove the following two elements: (1) that the defendant used or carried a bomb (5. *Section 924(c) uses the term firearm. However, as explained below, firearm includes a bomb.*); and (2) that he did so during and in relation to a crime of violence. Smith v. United States, 508 U.S. 223, 228 (1993).

1. Use/Carry A Bomb

a. Definition of Use

To satisfy the "use" prong of § 924(c) (1) the government must prove more than mere possession of a bomb, but rather "active employment". Bailey v. United States, 116 S.Ct. 501, 506 (1995). Active employment includes "brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire a firearm." Id. at 508.

b. Definition of Carry

To satisfy the "carry" prong of § 924(c) (1) the government must prove the defendant "transported [the bomb] on or about his or her person." United States v. Hernandez, 80 F.3d 1253, 1258 (9th Cir. 1996).

c. Definition of Bomb

Section 924(c) makes it a crime to use or carry a "firearm" during and in relation to a crime of violence. Firearm is defined in § 921(a) (3) (D) as including "any destructive device". A destructive device is further defined in § 921 (a) (4) as including "any explosive [or] incendiary . . . bomb". Accordingly, the Ninth Circuit has approved the following jury instruction with respect to a prosecution under § 924 (c):

A destructive device includes any incendiary device be it a military-type weapon or a homemade incendiary product, or components thereof, the function of which is to ignite and destroy property. It must be similar to an explosive or incendiary bomb, grenade, missile, or firebomb, but need not be identical.

Any device composed of a combustible material capable of producing sufficient heat to destroy property of any kind and having components designed to ignite that combustible material is under the law an incendiary device similar to a fire or incendiary bomb.

The term "destructive device" does not include any device which is not designed or redesigned as a weapon for the destruction of property.

United States v. Hedgcorth, 873 F.2d 1307, 1311 (9th Cir. 1989); United States v. Peterson, 475 F.2d 806, 811-12 (9th Cir. 1973) (approving virtually identical instruction). Both of the foregoing cases concerned an incendiary device that was used to destroy property and are cited for illustrative purposes only.

In determining whether the device in question was "designed or re-designed for use as a weapon", the court should consider "(1) the nature of the device and (2) the intent with which it was constructed and used." United States v. Hedgcorth, 873 F.2d at 1311. Here again, proof that the defendant's bombs were of an anti-personnel type and proof of the defendant's intent as expressed through his writings are relevant to prove that his bombs were designed for use as weapons within the meaning of § 924 (c).

The fact that a device cannot be "thrown, aimed or wielded" does not prevent it from being considered a weapon for these purposes. Id. at 1312. Moreover, where it is self evident from the facts of the case that the defendant intended to and did blow up and destroy property and that the device used was both a destructive device and a bomb within the meaning of the statute, the composition of the explosive charge is immaterial. United States v Wilson, 546 F.2d 1175, 1177 (5th Cir. 1977)

2. During and in Relation To A Crime of Violence

The term crime of violence is defined in the statute as follows:

An offense that is a felony, and

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(c) (3). Mailing a bomb in violation of 18 U.S.C. § 1716 is a crime of violence for the purpose of 18 U.S.C. § 924(c) (1). United States v. Collins, 109 F.2d 1413, 1418-19 (9th Cir. 1997).

The term "in relation to" was intended to be "deliberately expansive" and "broad" in its application. Smith v. United States, 508 U.S. 223, 237 (1993). "The phrase 'in relation to' thus, at a minimum clarifies that the firearm must have some purpose or effect with respect to the [crime of violence]; its presence or involvement cannot be the result of accident or coincidence." Id. at 238. Interpreting the "during and in relation to" language, the Ninth Circuit has held:

If the firearm is within the possession or control of a person who commits an underlying crime as defined by the statute,

and the circumstances of the case show that the firearm facilitated or had a role in the crime, . . . then there is a violation of the statute.

United States v. Loaiza-Diaz, 96 F.3d 13335, 1336-37 (9th Cir. 1996);
United States v. Stewart, 779 F.2d 538, 540 (9th Cir. 1985).

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